AUG 24 1945
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1945

No. 131

NORRISTOWN HERALD, INC.,
Petitioner

vs.

GEORGE BAUSEWINE

BRIEF OF RESPONDENT CONTRA PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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I.

COUNTER-STATEMENT AS TO JURISDICTION

The petitioner's statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment in question fails to comply with the requirements of Rule 38 and Rule 12, paragraph 1 (as incorporated by reference in Rule 38, paragraph 2), and therefore the petition for certiorari should be denied.

In particular, the petitioner's statement fails to show that the nature of the case and of the rulings of the Pennsylvania Supreme Court was such as to bring the case within the jurisdictional provision relied on (Section 237 of the Judicial Code, 28 U. S. C. Section 344(b)). Nor does the petitioner cite any cases to sustain the jurisdiction.

This being a petition for certiorari to a state court, the petitioner's statement should also set forth the ground upon which it is contended the questions involved are substantial (*Zucht v. King*, 260 U. S. 174, 176, 177; Rule 12, paragraph 1, incorporated by reference in Rule 38, paragraph 2).

Although the petitioner asserts (Petition for Certiorari, page 9) that the questions of denial of due process of law, of trial by jury, and of the Constitutional guarantee of a free press were raised in the Supreme Court of Pennsylvania, the printed record nowhere supports this assertion. Counsel for the petitioner has re-

ferred to Assignments of Error Nos. 5, 8, 9 and 14 in the Supreme Court of Pennsylvania. Actually, Assignments of Error Nos. 5, 8 and 9 were based merely upon routine objections made during the course of the trial to alleged prejudicial statements by the plaintiff and his counsel. The triviality of these objections was apparent both to the trial court and to the Supreme Court of Pennsylvania, and by no feat of legal legerdemain is it now possible to transmute these points into substantial federal questions. The same conclusion applies to Assignment of Error No. 14 in the state court, this being merely a blanket exception to the lower court's dismissal of defendant's motion for new trial. Similarly, the argument made in pages 69 to 79 in Appellant's Brief in the Pennsylvania Supreme Court, now relied on in the Petition for Certiorari (page 9), merely urges that the lower court's refusal to grant a new trial was an abuse of discretion, and in no portion of this argument is any federal question raised. An inspection of the opinions of the Pennsylvania Supreme Court (*Bausewine v. Norristown Herald, Inc.*, 41 Atl. (2d) 736), (R. 545-556) and of the Montgomery County Court of Common Pleas (R. 504-530) will show that neither court considered that any federal question was involved or argued.

The petitioner's utter indifference to these requirements of Rule 38 (and Rule 12, paragraph 1, as incorporated therein) is so flagrant in the present case as to demand a denial of the petition for certiorari for this reason.

II.

COUNTER-STATEMENT OF MATTERS INVOLVED IN THE CASE

Counsel for the petitioner has recited a procedural history of the case in his petition for certiorari (pages 2-8) but has omitted to state the facts of the case. The essential facts leading up to the publication of the four libels here in question are as follows, *standing uncontradicted in the testimony:*

On November 26, 1940, Mr. Ralph Beaver Strassburger, the president of the Norristown Herald, Inc., and the owner of its stock, requested his editor, Walter A. Wilson, to get in touch with the plaintiff, who was then Chief of Police of the Borough of Norristown, to see if he would come out to Mr. Strassburger's farm office at "Normandy Farms" for an interview. Mr. Wilson delegated the police reporter, William Rambo, to take Chief Bausewine to see Mr. Strassburger, and he did so (R. 66).

In this conference, Mr. Strassburger said to the plaintiff, "Chief, I know you make a lot of investigations for the F. B. I. around here, and I am in a lot of trouble, and want you to help me." The plaintiff replied, "Before we go into any long conversation, well, Mr. Strassburger, if you want me to help you to get any information from the F. B. I., I will take up your telephone now and call Mr. John Sears, who is Special Agent in town,

and make an appointment for you to go with me to their office tomorrow morning at 11 o'clock." (R. 157).

Mr. Strassburger agreed, and the appointment with Mr. Sears was made. However, the next day when the plaintiff kept the appointment, Mr. Strassburger failed to appear (R. 157).

In further conversation with the plaintiff, after his telephone call to Mr. Sears, Mr. Strassburger told him that a few days before he had been followed to his home from the 30th Street Station in Philadelphia, where he got off the train from Washington, by three automobiles occupied by men who then remained about the environs of his home for two or three days. He asked the Chief to get the names of these men so that he could take it up with the Department of Justice and have them dismissed (R. 161).

Two days after this conference Mr. Strassburger reported the conversation to his editor, Wilson (R. 66). He told Wilson that he had informed Chief Bausewine about the cars that had followed him from 30th Street Station to "Normandy Farms" and had asked him to obtain the names and addresses of the drivers. He said to Wilson that he had already had someone look up the owners of the cars in Harrisburg but couldn't find anything about them because they were marked "official," and he then admitted to Wilson that he knew they were "F. B. I. snoopers," and said he was going to use the power of his newspaper to have them fired (R. 71-72).

A few weeks later Strassburger asked his editor, Wilson, whether Bausewine was going to make any re-

port to him of the names and addresses of "those F. B. I. snoopers." Wilson said he would ask Bausewine. Thereafter he reported to Strassburger that Bausewine refused to do anything because it was purely an F. B. I. matter. Mr. Strassburger then said, "He better get it, or I will run him to hell out of Norristown, he better get that information for me." (R. 73).

After Mr. Strassburger returned from Florida in February or March, 1941, he again asked Wilson if Bausewine had obtained the report that he had requested. Wilson replied, "Mr. Bausewine is not going to help you out. He is going to stand by the Government. * * * You got yourself in a mess with the Government, you have to get yourself out of it." (R. 74).

From that time on, every time Strassburger came in the office he asked about the report. On one occasion several months later he said to Wilson, "He better get it, because that son-of-a-bitch, Bausewine, is going to find out my newspaper has more power hereabouts, than the F. B. I." (R. 74).

This sort of thing continued until Mr. Wilson resigned as editor on October 11, 1941. As long as Wilson was editor he prevented Strassburger from carrying out his threats to use his newspaper to get even with Bausewine by printing scandalous or libelous stories about him. When Strassburger asked what Wilson would do to prevent it, he replied that he would push the type on the floor and prevent the paper going out that day (R. 74-75).

Time and time again Strassburger asked Wilson, "Do

you know any dirt against the Chief of Police?" And Wilson replied that he didn't know anything of the character Strassburger wanted (R. 75).

The last time that Wilson had a conversation with Strassburger was on December 2, 1941, in the newspaper's New York office, where Wilson went to talk over a business proposition with Strassburger involving the Norristown Times Herald. After discussing their business, Strassburger said, "I want to tell you something, Mr. Wilson, now that you are not over there in the newspaper anymore, I am going to do two things. * * * I drove Senator Bean out of Montgomery County politics, and I smeared Ambassador Bullitt in his diplomatic relations; now, I am going to drive Ditter out of Congress, and I am going to drive that son-of-a-bitch, Bausewine, out of Norristown." (R. 75-76).

At the same time he said he had hired a number of men to look up stories about Chief Bausewine, and he had been disappointed that they had not brought him in anything worth while, but he was going to continue hiring men until some investigator brought some story he could publish about him. He mentioned Nick Hayes and Warren Jackson as two of these investigators (R. 76-77). Jackson later turned out to be the agent who supplied the defendant with the untrue story which suggested that the plaintiff had been a bootlegger's truck rider in Florida during the prohibition era, as set forth in the libelous publication of September 21, 1942, (Exhibit P-4, R. 61-62). (R. 194, R. 201-205). The other investigator, Nick Hayes, was referred to by Strassburger himself in his conference of November 26, 1940, with the plaintiff. When

the plaintiff said to Strassburger that he was surprised that he had a character such as Nick Hayes as an associate, Strassburger replied that he needed that type of person around him in order to get underground information (R. 102).

During the course of time when Mr. Strassburger was becoming irritated over the plaintiff's failure to do what he asked, his persistent demands for the report on the F. B. I. men were made not only through his editor, Wilson, but also through his police reporter, William Rambo (R. 102-103). Rambo began to notice that, in the police news that he wrote for the paper, whenever he wrote a story pertaining to Chief Bausewine, the Chief's name was almost always deleted in the editing of the story (R. 105). Thereafter, in the Spring of 1941, Rambo was ordered to stay out of City Hall, and two months later he was "farmed out" to the North Wales section of the County, where he remained until July or August of 1942 (R. 105-106).

In August of 1942, Rambo was called into the office of Mr. Fox, who was then editor of defendant's newspaper. Fox told him that the time had come when he would have to choose between Chief Bausewine and Mr. Strassburger. Rambo replied that this was ridiculous, and that since Mr. Strassburger was his employer and Chief Bausewine was his friend, there was no reason why he couldn't be loyal to both of them. Fox then said that Mr. Strassburger often wanted to fire Rambo, but Fox wouldn't do it because he thought Rambo was doing a good job. He wound up this conversation by saying to Rambo, "You know, Mr. Strassburger has it in for the Chief." (R. 107-109). For a period of time from

the middle of 1941 to the middle of 1942 Mr. Fox had requested Rambo to get information for articles against Chief Bausewine and Rambo had replied that he knew of nothing (R. 110-111).

On Tuesday, July 28, 1942, the article referring to Chief Bausewine as a "Philadelphia castoff" was published. (Plaintiff's Exhibit P-1, R. 51-52). On Friday, July 31, 1942, the article referring to Chief Bausewine as the "pal" of Joe Allegro, who had a long criminal record as a thief and bawdy-house operator (set forth in full in the article) was published (Plaintiff's Exhibit P-2, R. 52-57).

Under date of August 13, 1942, the plaintiff wrote a letter to Mr. Strassburger, as president of the defendant corporation, demanding an apology or retraction of the Allegro article. No answer to this letter was received by the plaintiff (R. 57-59).

On September 19, 1942, the plaintiff filed the first of the two suits here involved, and his statement of claim was served immediately (R. 3). On that same day the defendant's newspaper appeared with a banner headline in very large type, extending the whole width of the paper, announcing: "BAUSEWINE, POLICE CHIEF, SUES TIMES HERALD." In the text of the accompanying articles, explaining the suit, the statement was made (Plaintiff's Exhibit P-3, R. 59-60):

> "The Times Herald gladly accepts the challenge. The suit should give Norristown a long-needed showdown on whether this Borough and its people should

longer tolerate this Philadelphian, former associate of a gangster, as the head of its police department."

On the morning of the same day on which the first suit was filed and served, and the aforesaid article published, Mr. Strassburger called William Rambo into his office and accused him of calling Chief Bausewine and telling him that Strassburger was in the building so that the statement of claim could be served on him. Rambo denied this. Strassburger then asked Rambo, "Why didn't Chief Bausewine get the names of the F. B. I. men that I wanted?" (R. 111). Rambo replied that the Chief's reason was that he worked with the F. B. I. and couldn't get any such information against the Government (R. 113).

Mr. Strassburger had the statement of claim that had just been served on him, and he turned to his editor, Mr. Fox, and said, "Mr. Fox, do we have time to get this in the paper today?" Mr. Fox said, "Yes," and Strassburger then said, "Get the biggest type we have, and we will spread it over the papers." Then he ordered Mr. Fox to leave the office and write the story. When Fox came back with it, Strassburger said, "If the Chief wants a fight, we will give him a good one." Strassburger then edited the article himself and personally inserted the paragraph quoted above (R. 115). After this article was prepared, Mr. Strassburger said to Mr. Fox, "We will go out to my farm over the week-end, and prepare a whole series of articles." (R. 116).

On Monday, September 21, 1942, another article was published in defendant's newspaper (Plaintiff's Exhibit

P-4, (R. 60-62), again carrying a banner headline in large type spread across the full width of the paper, announcing:

"BAUSEWINE WANTED APOLOGY FOR PRINTING COURT RECORD"

"SO, WE PRINT IT AGAIN, WITH QUERY ABOUT BEER TRUCKS PUT UP TO CHIEF OF POLICE"

"LAWLESS PROHIBITION DAYS OF BOOTLEGGING RECALLED—HEAD COP DRAWS PHILADELPHIA PENSION AS WELL AS NORRISTOWN SALARY."

In the body of this article, reference was made to the plaintiff's letter of August 13, 1942, requesting an apology for the Allegro article, and then this statement was made: "The Times Herald has no intention of making an apology for printing a public record." Under the subheading "Lawless 'Dry' Days Recalled," the article went on to suggest, in the form of a rhetorical question, that the plaintiff had been a rider on bootleggers' trucks at or near Boca Raton, Florida, in the prohibition period (R. 62).

On October 2, 1942, the second suit was filed by the plaintiff as a result of the last mentioned two publications. The statement of claim was served on October 21, 1942 (R. 12). On the latter date, William Rambo was again

called into Mr. Strassburger's office and was again accused by him of calling someone to tell them he was in the building (R. 116). He also told him he was too close to Mr. Bausewine and then asked his general manager, Mr. Shelton, if he could discharge Rambo. When Shelton answered that he could, Strassburger told Rambo he was discharged, and when Rambo asked whether he was to assume that he was being discharged because he was too close to Chief Bausewine, Strassburger said, "Yes, that is a good reason, good-bye." (R. 116-117).

Thereafter, Rambo wrote to the general manager of the Times Herald asking to be given a reason for his dismissal and in reply received a letter dated November 18, 1942 (Plaintiff's Exhibit P-5, R. 118) which stated:

> "Before we are able to release letter giving the reason for your dismissal we must have an additional guarantee in writing in which you must state that all communications from us will be held in confidence by yourself and the Guild, and the contents of these communications will not be divulged as the matter is one between an employer, the Norristown Herald, Inc., and an employe, William Y. E. Rambo, and that you will not bear witness against us."
>
> (R. 118)

The foregoing recitation of the facts leading up to the trial of these two actions seems indispensable to an understanding of the issues, since these causes of action, in which the plaintiff is claiming punitive damages, are founded directly upon the presence of actual personal malice in the publication of the four libels.

ARGUMENT

NO FEDERAL QUESTION HAS BEEN RAISED, NOR IS EVEN REMOTELY INVOLVED, IN THE PRESENT CASE

In the guise of arguing that trial by jury has been denied, actually the only question raised by this petition for certiorari is whether the trial court abused its judicial discretion in ordering a remittitur as an alternative to granting another new trial, after the defendant had already been given the benefit of two trials. The State Supreme Court has clearly and properly decided this question under Pennsylvania law, and no bona fide question of federal law is involved in this case at all.

If this case is to be reviewed by the Supreme Court of the United States, then every case which involves allegedly excessive damages involves a federal question. Actually, all that the petitioner is asserting is that the verdicts of the jury were excessive. This is admitted. But the excessiveness has been cured by the remittiturs entered in the trial court, and this has been affirmed by the Pennsylvania Supreme Court, whose decision as to the propriety of a remittitur under Pennsylvania law should be regarded as final.

Surely, on this point there is little that can be added to the concise summation contained in the opinion by Mr. Justice Jones in the Pennsylvania Supreme Court (41 A. (2d) at 742-743) (R. 554):

"We are certainly in no position to say that the learned court below erred when it entered judgments for the plaintiff in one-fourth of the amounts of the verdicts. The cases had been tried twice with resultant verdicts against the appellant in an aggregate amount of $50,000 each time. Punitive damages were especially indicated because of the proofs of actual malice, which had been openly avowed and deliberately carried out. And, the continued existence of the actual malice was further accentuated by the defendant's failure to make good its plea of truth and justification and, particularly, by its persistence in that plea (at the new trial obtained on its motion) after a jury had already discountenanced the plea and had rendered verdicts for the plaintiff in quite substantial sums. See Will v. Press Publishing Co., 309 Pa. 539, 544, 164 A. 621."

The Supreme Court of the United States has ever been mindful that the remission of a portion of a verdict, as a condition for refusing a new trial, is entirely a matter within the discretion of the trial court: *Northern Pacific R. Co. v. Herbert,* 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755 (1886); *Clark v. Sidway,* 142 U. S. 682, 12 Sup. Ct. 327, 35 L. Ed. 1157 (1892).

Numerous decisions of the Supreme Court of Pennsylvania have recognized that there is a wide latitude in the discretionary power of the lower court to direct a remittitur of a substantial amount as an alternative to a new trial, and this is especially so in cases involving unliquidated or punitive damages. In the leading case of *Wirsing v. Smith,* 222 Pa. 8 (1908), the action of the

trial court in directing a remittitur to the extent of $10,000 of a $45,000 verdict for punitive damages for an aggravated assault and battery was upheld, and in reviewing the Pennsylvania law on the subject, Mr. Justice Elkin said (at pages 16-17):

> "The learned trial judge evidently followed the rule of our own cases in this respect in a well-meaning effort to have the matters in dispute between the parties finally determined. In Fleming v. Dixon, 194 Pa. 67, our Brother Brown, in passing upon a conditional order made by the court below and not accepted by defendant, said, 'the relief tendered was refused. The order of court providing for it was made for the benefit of the defendant now complaining of it, and we overrule his second assignment of error.' In Stauffer v. Reading, 206 Pa. 479, the present chief justice, in reviewing the discretionary power of courts in granting or refusing new trials, among other things, said: 'Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great.' It is clear, therefore, that the learned court below was well within the rule of our own cases in this respect, and certainly should not be convicted of error for doing what this court has said he had the right to do in the proper exercise of his judicial discretion."

A remittitur for more than one-half of the amount of the jury's original verdict is by no means without precedent. For example, in *Boyer v. Pitt Publishing Co.*,

324 Pa. 154 (1936), the Pennsylvania Supreme Court approved a reduction in a verdict in a libel case from $6,000 to $2,500, where it appeared that plaintiff had proved no special damages, nor even any exhibitions of actual personal malice such as those in the present case.

Accordingly, the respondent respectfully requests your Honorable Court to deny the petition for certiorari.

Respectfully submitted,
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